STATE OF MICHIGAN

COURT OF APPEALS

DENNIS G. STEVENS and KATHLEEN STEVENS,

Plaintiffs-Counterdefendants-Appellees/Cross-Appellants,

v

GREAT AMERICAN TITLE COMPANY,

Defendant,

and

PETER K. NESS and SALLY A. NESS,

Defendants-Counterplaintiffs-Third-Party Plaintiffs-Appellants/Cross-Appellees,

and

SHIRLEY CARPENTER,

Third-Party Defendant-Appellee.

UNPUBLISHED
September 16, 2003

No. 233778
Oakland Circuit Court
LC No. 98-009528

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendants Ness appeal as of right from the circuit court order denying them summary disposition pursuant to MCR 2.116(C)(10) and from the trial court's order, after a bench trial before a different judge, entering judgment for plaintiffs and enforcing a land contract building restriction under the doctrine of equitable servitudes. We affirm.

Plaintiffs Stevens owned two adjacent parcels of land known as parcels D1 and D2 that "front" Lake Angelus. On August 16, 1995, plaintiffs entered into a purchase agreement with third-party defendant Shirley Carpenter ("Carpenter"), defendants' predecessor in interest, for the sale of plaintiffs' D1 parcel. On December 8, 1995, plaintiffs entered into a land contract with Carpenter and executed a warranty deed conveying D1 to Carpenter. However, plaintiffs

Stevens and Carpenter regarded this as a partial closing because the documents did not reflect the intent of the parties and some changes were necessary. In mid-January 1996, plaintiffs Stevens and Carpenter executed an addendum to the land contract; the addendum provided for more restrictive building limitations on parcel D1 than had been provided for in the deed. The deed was never amended.

The addendum provided:

> q.) Upon closing, Buyer and Seller agree to a Deed Restriction regarding the 'Building Area/Pocket' in which structures may be built. All structures to be built on D1 shall start NO FARTHER than 25 feet from the Westerly Lot line of Parcel D1, or that line closest to what is commonly known as the FISHER ESTATE, and shall NOT be built any CLOSER to the lake than the STONE WALL that runs parallel to Lake Angelus Road on the subject property (approx. 294 ft. from rd.) NOTE: The purpose of said Deed Restriction is to insure that ALL STRUCTURES to be built on Parcel D1 shall have the maximum distance from the common lot line between D1 and D2, but in NO WAY LIMITS the size of said structures, only the starting point of construction in reference to the lot lines. (If **BOTH Parcel Owners Agree** the 25 foot restriction may be modified.)
>
> r.) The 15 foot easement for Parcel D2 from the road to the STONE WALL that runs parallel to Lake Angelus Road on the subject property is agreed upon by Buyer and Sellers. [Emphasis in original.]

The restrictions in the Carpenter warranty deed provided:

> For the sum of Two Hundred Fifty Thousand and 00/100 ($250,000.00) subject to the existing building and use restrictions, easements, and zoning ordinances, if any, and subject to a Deed Restriction as called for in the Purchase Agreement dated August 16, 1995 prohibiting an improvement to the subject property within 300 feet of the seawall.

Defendants first contend that the court erred when it denied defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) because the building restriction in the Carpenter land contract merged into the Carpenter warranty deed and that therefore, the circuit court should have found, as a matter of law, that the building restriction in the Carpenter warranty deed constituted the complete agreement. According this issue de novo review, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), we disagree.

A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4), *Maiden*, *supra* at 109, and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Under the doctrine of merger, "a deed made in execution of a contract for the sale of land is presumed to merge the provisions of a preceding contract pursuant to which it is made, including all prior negotiations and agreements leading up to the execution of the deed . . . ."

Goodspeed v Nichols, 231 Mich 308, 315-316; 204 NW 122 (1925). However, plaintiffs maintained that the addendum was executed subsequent to the deed.

Defendants wrongly argue that the circuit court found, in ruling on the motions for summary disposition, that plaintiffs Stevens had a particular intent, and argue that, in fact plaintiffs Stevens had a contrary intent. We do not read the circuit court's opinion and order regarding summary disposition as making any findings regarding plaintiffs Stevens' intent. We further reject defendants' contention that the court was obliged, at the summary disposition stage, to determine as a matter of law that the less restrictive restriction applied, simply because it was less restrictive and restrictions on the use of property are not favored. Accordingly, we conclude that the circuit court's denial of defendants' summary disposition motion was proper.

Defendants next argue that the trial court erred when it concluded that defendants were bound by the land contract building restriction under the doctrine of equitable servitudes on the ground that defendants had constructive notice of the restriction. According the trial court's conclusions of law de novo review and reviewing the court's factual findings for clear error, *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000); *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002), we disagree.

In *Sun Oil Co v Trent Auto Wash*, 379 Mich 182; 150 NW2d 818 (1967), our Supreme Court recognized the common law doctrine of equitable servitudes. In recognizing this legal concept, it quoted with approval the Supreme Court of Georgia's opinion in *Langenback v Mays*, 207 Ga 156; 60 SE2d 240 (1950), as follows:

> Equity will enforce a lawful restrictive agreement concerning land against a person who takes with notice of the contract. In such a case, the person violating the agreement, though not a party to it, is a privy in conscience with the maker. [*Langenback*, *supra* at 158, internal citations omitted.]

Although defendants correctly point out that our Supreme Court did not enforce an equitable servitude in *Sun Oil*, it did order the trial court in that case to apply the doctrine after holding a full hearing. *Sun Oil*, *supra* at 191. The clear significance of *Sun Oil* was our Supreme Court's recognition of the common law doctrine of equitable servitudes as a viable doctrine in Michigan real property law. After *Sun Oil*, this Court applied the doctrine in *Nib Foods, Inc v Mally*, 70 Mich App 553, 562; 246 NW2d 317 (1976), holding that the plaintiff, who was the beneficiary of a restriction that prevented the defendants from using their property to operate a restaurant, could enforce the restriction against a subsequent prospective purchaser because the notice of *lis pendens* gave the purchaser prior knowledge of the restrictive agreement. Accordingly, Michigan courts do recognize this common law doctrine.

Defendants further argue that *Sun Oil* requires that a subsequent purchaser have actual notice of the restriction in order for the doctrine of equitable servitudes to apply. Although the *Sun Oil* Court did not expressly state that constructive notice would satisfy the doctrine's notice requirement, it did quote with approval the following language from *Thodos v Shirk*, 248 Iowa 172; 79 NW2d 733 (1956):

> Since the doctrine of equitable servitudes rests upon the theory of a servitude imposed upon the land, enforceable against all subsequent purchasers of the land

> who are charged with notice *actual or constructive*, the requirement of the special words such as "and assigns" is unnecessary in the deed. The sole test for the running of the burden in equity is the intention of the parties to impose a servitude upon the land as distinguished from a personal promise of the present owner. [*Sun Oil, supra*, 379 Mich 187; emphasis added.]

We further observe that although the trial court concluded that it could not find "actual notice," the court defined actual notice as having a copy of the actual addendum to the land contract.[1] The court's findings with respect to constructive notice, discussed below, satisfy the notice necessary to support application of the doctrine of equitable servitudes.

Defendants further contend that the trial court erred in finding that they had constructive notice of the building restriction in the land contract addendum. At the close of trial, the trial court concluded that plaintiffs' proofs of constructive knowledge met the preponderance of the evidence standard. In particular, the court noted that defendant Peter Ness drew in a "building pocket" on the Certificate of Land Survey and that this drawing corresponded to the building restriction in the land contract addendum. The trial court further noted that that survey indicated "180 feet in the building area" and had a line pointing from that statement to the building pocket area on the survey. Further, defendant Peter Ness' handwritten note on the survey indicates "No view to water from the building site," and the court found that defendant made this notation before he closed on the property. The court also noted defendant Peter Ness' testimony that he did his own title search at the office of the county register of deeds and found a memo of land contract but never requested a copy of the land contract.

We further observe that the addendum to the land contract was recorded before defendants Ness closed on their purchase agreement with Carpenter. Additionally, testimony at trial indicated that either Dennis Stevens or Shirley Carpenter walked the perimeter of D1 with defendants and pointed out the location of the "building pocket." Further, defendant Sally Ness acknowledged that the building pocket and the lack of a view of the lake from that building pocket were factors that defendants Ness used as a bargaining chip in negotiating their purchase price for the property. In view of the documentary evidence and testimony presented at trial, we conclude that there is ample support for the court's finding of constructive notice adequate to support the application of the doctrine of equitable servitudes to enforce the building restriction set forth in the addendum to the land contract. Accordingly, we find no error.

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[1] The court said:

> The Plaintiffs assert that the Defendants had actual knowledge of the land contract building restrictions prior to closing on the purchase of Parcel D1.
>
> The evidence on this assertion is spotty. While three witnesses opined that the Nesses had a copy of the land contract, or at least acted as if they had a copy, nobody actually claimed to have given them a copy of the contract or saw them in possession of the document.
>
> Plaintiffs' proofs on actual knowledge fall short of a preponderance and must therefore fail.

Defendants further argue that the trial court erred when it failed to consider the equities of the case, which, according to defendants, favor them. Although defendants contend that plaintiffs were negligent in failing to amend their deed to reflect the land contract building restriction and that this negligence precludes equitable relief, defendants never raised this issue below. We will not address issues first raised on appeal. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We further observe that plaintiffs' failure to amend the deed does not change the fact that the court found that defendants were aware of the building pocket restriction, even if they had not had actual knowledge in the form of a copy of the addendum.

Defendants further contend that the trial court erred in ignoring their evidence of plaintiffs' fraud because a document prepared by the title company requiring plaintiffs to return Carpenter's earnest money deposit proves that there was no real transaction between Carpenter and plaintiffs. The trial court, in its oral ruling, acknowledged defendants' argument that the transaction between plaintiffs and Carpenter was a sham, but concluded that it found the testimony of Carpenter and plaintiff Dennis Stevens "overwhelmingly convincing to the effect that this was a legitimate sale." We defer to a trial court's determination of credibility. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). Accordingly, we find no merit to defendants' argument.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio